

# UNILATERAL REFUSAL TO DEAL: KING COLGATE IS DEAD!

## I. INTRODUCTION

In addition to being the golden anniversary of the Treaty of Versailles, the turbulent year 1968 marked the 50th birthday of *U.S. v. Colgate & Co.*<sup>1</sup> and its doctrine of "unilateral refusal to deal." Perhaps it is appropriate that 1968 was also the year of decision for *Albrecht v. The Herald Co.*<sup>2</sup> and *F.T.C. v. Texaco, Inc.*,<sup>3</sup> for these two cases have sounded the death toll for the ailing *Colgate* doctrine.

This writing will trace the birth of *Colgate*, study its steady erosion through to the recent *Park, Davis*<sup>4</sup> decision and will then consider the cases subsequent to *Park, Davis* which, in the author's opinion, spell the eventual demise for any meaningful application of the doctrine. In large part this survey shall be limited to Supreme Court decisions, although consideration will be given to several post-*Parke, Davis* cases in the lower courts.<sup>5</sup>

## II. ROUND ONE

To place *Colgate* in its proper setting, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>6</sup> must be introduced. Dr. Miles executed written contracts with all of its jobbers and wholesalers. The contracts established a consignment method of distribution and required each distributor to sell only to designated druggists at prices established by Dr. Miles. When Dr. Miles sued to enforce this contract against Park & Sons, a price-cutting distributor, the Supreme Court found the consignment provision to be a sham, and the price-fixing provision to be void as an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Thus the requested injunction did not issue against Park & Sons.

In *Colgate*, the government alleged that Colgate's price maintenance program was established and enforced by the following means: (1) let-

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<sup>1</sup> 250 U.S. 300 (1918).

<sup>2</sup> 390 U.S. 145 (1968).

<sup>3</sup> 393 U.S. 223 (1968).

<sup>4</sup> *U.S. v. Park, Davis & Co.*, 362 U.S. 29 (1960).

<sup>5</sup> There is no dearth of writing on the subject of unilateral refusal to deal. Some of the leading articles include: Fulda, *Individual Refusals To Deal: When Does Single-Firm Conduct Become Vertical Restraint?* 30 LAW & CONTEMP. PROB. 590 (1965); Potvin, *Choosing and Dropping Distributors* 26 A.B.A. ANTITRUST SECTION 99 (1964); Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals To Deal* 75 HARV. L. REV. 655 (1962); Comment, 42 N.Y.U. L. REV. 947 (1967). For an excellent discussion of the way Great Britain has approached the problem, see, Harding, *Refusal To Sell As A Method Of Enforcing Resale Price Maintenance — British Experience and Legislative Restriction* 61 NW. U. L. REV. 719 (1967).

<sup>6</sup> 220 U.S. 373 (1910).

ters, circulars and lists were distributed displaying the uniform prices to be charged and stating that any non-complying dealer would be cut-off, (2) requests, often complied with, were made of dealers to report price-cutters, (3) investigations were made and violators were placed on suspension lists, (4) offending dealers were asked for assurances of their future compliance and (5) those dealers who promised to observe the pricing policy were retained, while those who refused were cut-off. The Court's first task was to avoid *Dr. Miles*:

[T]he indictment does not charge Colgate & Company with selling its products to dealers under agreement which obligated the latter not to resell except at prices fixed by the company.<sup>7</sup>

*Dr. Miles* had forbade resale price maintenance by express contract; no such contract was involved here. The complaint had alleged a combination but the district court held that the facts did not prove the allegation. The Supreme Court considered itself bound by this finding of the lower court. Without a contract, combination or conspiracy, Section 1 of Sherman cannot be violated, so the Court concluded:

In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.<sup>8</sup>

The most obvious defect in the *Colgate* opinion is that the facts clearly showed that the company had entered express contracts with its dealers to maintain prices. A more serious and lasting fault is that even if there was no express, nor even an implied agreement, a *combination* had been entered into by Colgate and its dealers. The Court seemed to require proof of an agreement before it could find a combination. But if price-fixing by contract is an evil, it makes no sense to permit the same to be achieved through coercion of dealers. *Agreement* should not be required to establish an unlawful *combination*.

### III. ROUND TWO

The smell of death surrounded *Colgate* within a year of its birth. In *United States v. A. Schrader's Son, Inc.*<sup>9</sup> the Court had the occasion to interpret its earlier decision. Schrader's caused all of its jobbers to sign contracts to resell at prices set by the company. It refused to sell to any jobber who failed to sign or observe the contract. The government contended that Schrader's had entered into a conspiracy or combination with

<sup>7</sup> 250 U.S. at 307.

<sup>8</sup> *Id.*

<sup>9</sup> 252 U.S. 85 (1919).

its jobbers to fix prices, but the district court dismissed the suit on the basis of *Colgate*. In reversing the Supreme Court stated:

The court below misapprehended the meaning and effect of the opinion and judgment in that cause [i.e., in *Colgate*] . . . Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices . . .<sup>10</sup>

In *Frey & Son v. Cudahy Packing Co.*<sup>11</sup> the district court submitted to the jury the question of whether a contract, combination or conspiracy existed and the plaintiff was awarded treble damages. The court of appeals reversed on the ground that *Colgate* required a directed verdict for defendant unless an express contract to fix prices could be shown. The Supreme Court corrected this notion concerning *Colgate*:

Apparently the former case [*Colgate*] was misapprehended. The latter opinion [*Schrader's*] distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.<sup>12</sup>

So the Supreme Court agreed with the trial court that a jury could infer that the requisite contract, combination, or conspiracy existed. However, the court of appeals was affirmed on the ground that the trial judge had given an erroneous and prejudicial instruction to the jurors. The instruction stated that if it was found that the manufacturer had announced and frequently reminded his jobbers of his pricing policy and if the great majority of the jobbers had not only expressed no dissent, but had actually cooperated by selling at the named price, an agreement or combination could be implied. The Court rejected this instruction as being erroneous because no agreement or combination could be inferred from such behavior. This places a rather tight outer boundary upon the implied contract theory.

One of the most important cases to consider, and curtail, the *Colgate* doctrine is *F.T.C. v. Beech-Nut Packing Co.*<sup>13</sup> The action was brought by the F.T.C., and it sought to have the "Beech-Nut Policy" enjoined as an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Beech-Nut Policy was a price-maintenance program nearly identical to *Colgate's*. The Supreme Court enjoined the Company:

[F]rom carrying into effect its so-called Beech-Nut Policy by cooperative methods in which the respondent and its distributors, customers and

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<sup>10</sup> *Id.* at 99.

<sup>11</sup> 256 U.S. 208 (1920).

<sup>12</sup> *Id.* at 210.

<sup>13</sup> 257 U.S. 441 (1922).

agents undertake to prevent others from obtaining the company's products at less than the prices designated by it. . . .<sup>14</sup>

*Beech-Nut* differed from *Colgate* in two significant ways and the problem was to decide which of these two factors was the *most* significant in bringing about the opposite result in the cases. *Beech-Nut* was an action under Section 5, and, unlike the Sherman Act, Section 5 does not require a contract, combination or conspiracy. Probably most important, though, is the fact that the *Beech-Nut* complaint, unlike *Colgate*, alleged sufficient facts to show a contract.

In *U.S. v. Bausch & Lomb Optical Co.*<sup>15</sup> Soft-Lite was the exclusive buyer of tinted lenses which Bausch produced. Soft-Lite adopted a distribution policy of selling only to those wholesalers who would deal exclusively in the Soft-Lite line and who would cooperate in maintaining the Company's price policy. The wholesalers were to sell only to authorized retailers. If Soft-Lite discovered that a dealer was not following the published price list the dealer's name would be put on a black-list and the wholesalers would cut off his supply. The Court's language in holding that an illegal combination existed is important, for the Court expressly declared that even though no agreement is shown the combination can be found:

Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.<sup>16</sup> [Emphasis Added]

The Court's language discredited, if not overruled, the *Frey* case. A manufacturer's announcement of a policy, followed by compliance upon the part of his dealers, may indeed be sufficient to show an implied conspiracy.<sup>17</sup>

The cases discussed to this point have dealt with refusals to deal to maintain minimum prices or a monopoly.<sup>18</sup> However, it may be illegal to conspire to maintain maximum prices,<sup>19</sup> just as it may be unlawful to re-

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<sup>14</sup> *Id.* at 455-6.

<sup>15</sup> 321 U.S. 707 (1943).

<sup>16</sup> *Id.* at 723.

<sup>17</sup> *Cf.*, *United States v. Masonite Corp.*, 316 U.S. 265, 274-5 (1941); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-7 (1938). For a discussion of conscious parallel conduct and refusals to deal, see, *Turner, supra*, note 5.

<sup>18</sup> *Colgate* itself placed one clear limit on the right to refuse to deal, and that is when the refusal is part and parcel of an attempt to monopolize. In *Lorain Journal v. United States*, 342 U.S. 143 (1951) the publisher of the town's only newspaper attempted to maintain its monopoly position in news distribution by refusing to accept advertising from businesses that also advertised with a newly formed radio station. The Court easily found a violation of Section 2 of Sherman. See, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). Compare, *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594 (1952).

<sup>19</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1950). A more recent example of this is *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968).

fuse to deal as a means of enforcing a tying arrangement.<sup>20</sup> The Attorney General's Report of 1955 summarized the pre-*Parke, Davis* law in this fashion:

In conclusion, the decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their market context in light of the broader policies of which they are part.

The Committee approves this discerning market analysis of refusals to deal as essential to reconciling the preservation of legitimate individual business discretion with the protection of free enterprise from monopolistic practices and restraints of trade.

The Committee recommends no revision of the Sherman, Clayton, or Federal Trade Commission Acts designed to modify their impact on the anti-trust validity of refusals to deal.<sup>21</sup>

The Report, in this writer's opinion, gives support to an illogical system that considers form over substance. The Court before and after *Parke, Davis* has steadfastly refused to overrule *Colgate*. It has become increasingly difficult to establish that the refusal to deal was unilateral, but where it can be established — and notwithstanding the Supreme Court this is frequently accomplished in the lower courts — the refusal is protected from a Section 1 charge. If the premise that price-fixing is per se bad is accepted, then it only makes sense to condemn it no matter how it is achieved. The refusal to deal is viewed in its business context, as the Report notes, but an unwarranted limitation is placed upon this review by *Colgate*.

Unfortunately *Parke, Davis*, which is the end of Round Two, did little to improve the *Colgate* dilemma. The Court acknowledged this fact when it observed:

The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated. . . .<sup>22</sup>

*Parke, Davis* attempted to control the retail prices of its products by announcing its prices to all of the retailers concerned and informing them that price-cutters would be cancelled. If a retailer failed to observe the suggested price, he was put on a black-list and *Parke, Davis* informed its wholesalers that they too would be cut-off if they made any more sales to that retailer. A crucial fact in the case was that *Parke, Davis* obtained

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<sup>20</sup> *Times-Picayune Publ. Co. v. U.S.*, 345 U.S. 594 (1952) (Although no conspiracy was found here).

<sup>21</sup> ATT'Y GEN. NAT'L. COMM. ANTITRUST REP. 136-7 (1955).

<sup>22</sup> 362 U.S. at 44.

assurances from each retailer that he would observe the schedule, and then communicated this fact to every other retailer to induce their co-operation. The Court found this to be fatal:

It was only by actively bringing about substantial unanimity among the competitors that Park Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. . . . The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.<sup>23</sup>

The Court also found a second combination or conspiracy — this one was between Parke, Davis and the wholesalers who cooperated by refusing to sell to black-listed retailers.

The *Beech-Nut* and *Bausch & Lomb* decisions were cited with approval and the Court re-affirmed the proposition that no contract, either express or *implied*, need be proven to establish a violation of Section 1. Conduct evidencing a combination is sufficient. The weak spot in *Parke, Davis* is the dictum, quoted above, to the effect that a mere announcement of policy followed by a truly unilateral refusal to deal does not violate the Act. The Court incorrectly assumed that once such an announcement is made, the dealers are free to comply or not to comply, and that whatever path they follow their decision is *voluntary*. The fact is that once a powerful company announces that it will not supply price cutters, some dealers will be *coerced* into compliance.

#### IV. ROUND THREE

Round Three has not been completed, but enough of it has unfolded to forecast *Colgate's* demise. The case does not need to be overturned, but it must and will be limited in application to those situations where the refusal to deal will not constitute an unreasonable restraint of trade. A study of several post-*Parke, Davis* Supreme Court and lower court opinions reveals the theory that will be used to finish *Colgate*.<sup>24</sup>

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<sup>23</sup> *Id.* at 46-7.

<sup>24</sup> A few of the post-*Park, Davis* refusal cases that are not considered in this article are, *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962); *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 364 F.2d 957 (5th Cir. 1966); *Geo. W. Warner & Co., Inc. v. Black & Decker Mfg. Co., Inc.*, 277 F.2d 787 (2nd Cir. 1960); *Albert H. Cayne Equip. Co. v. Union Asbestos Co., Inc.*, 220 F. Supp. 784 (S. D. N. Y. 1963).

The defendant company in *Tobman v. Cottage Woodcraft Shop*<sup>25</sup> distributed price lists for its products and announced that it expected retailers to observe them. Defendant's employees then visited the various retail outlets and attempted to purchase for less than the suggested price. Any price-cutting retailer was informed that he would be cut off unless he conformed immediately. If the dealer conformed, he was not terminated. Plaintiff did not conform so his supply was cut off. The district court found no contract, combination or conspiracy and therefore, no violation:

[I]n order to be entitled to relief under the Sherman Act, plaintiff need not allege or prove either an express or implied agreement to fix prices. However, it is essential that he allege facts from which a *combination* for this purpose can be found; for the manufacturer's unilateral act in refusing to sell to a dealer who will not observe suggested retail prices, is not a violation of the Sherman Act.<sup>26</sup>

It would appear that this case was wrongly decided even under the conservative *Parke, Davis* standards. Plaintiff alleged an implied contract by his contention that defendant approached price-cutters and gave them one last chance to conform. If a price-cutter conformed after this — and plaintiff alleged that some did — an agreement should be found.

The case of *Osborn v. Sinclair Refining Co.*<sup>27</sup> supports this interpretation of *Parke, Davis*. Plaintiff was cut-off by Sinclair for not exclusively selling Goodyear TBA (tires, batteries & accessories), but when he agreed to sell only Goodyear products he was reinstated as a dealer. Again plaintiff violated the exclusive buying arrangement and again he lost his lease. The court of appeals found that this second refusal to deal was illegal. If a supplier chooses to cut-off a customer, he must do so without asking him to conform, and once the customer has been cut-off he cannot be safely reinstated.

*Klein v. American Luggage Works, Inc.*<sup>28</sup> is an interesting attempt by a district court to bury both *Colgate* and the dictum of *Parke, Davis*. Unfortunately the court of appeals was not favorably disposed to such action and it reversed.<sup>29</sup> The district court found that plaintiff was the owner of two retail stores that discounted defendant's products. This was violative of defendant's price maintenance policy. Defendant issued catalogues of suggested resale prices and each item was pre-ticketed with the price. New retailers were informed that the company expected them to sell at the suggested prices. If the retailer expressed his intention to discount, he would not receive any of defendant's products. Plaintiff was

<sup>25</sup> 194 F. Supp. 83 (S. D. Cal. 1961).

<sup>26</sup> *Id.* at 86-7.

<sup>27</sup> 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

<sup>28</sup> 206 F. Supp. 924 (D. Del. 1962).

<sup>29</sup> 323 F.2d 787 (3rd Cir. 1963).

warned several times that if he continued to discount he would be cut-off. Upon receiving complaints from two of plaintiff's competitors who did not sell at discount prices, defendant finally terminated plaintiff's supply. The court of appeals held that the evidence did not support any of the district's court's findings with regard to the existence of a contract, combination or conspiracy. It found that the evidence only showed the existence of conscious parallel conduct, which, standing alone, does not violate the Sherman Act. This is not the place to quibble over which court read the evidence correctly, but it is interesting to contrast the different attitude of the two courts on the issue of conscious parallelism. In considering the *Parke, Davis* dictum the district court stated:

The conceptual difficulty which inheres in this seemingly forthright line drawing process is the element of agreement which attends a seller's adherence to a manufacturer's schedule of resale prices. In the face of an advance announcement by the manufacturer that price cutters will be denied supply, a seller's compliance with prices suggested strongly infers a tacit or implied resale price maintenance agreement.

From a practical point of view, assuming lawful resort to the sanction of refusal to deal and consequent collective adherence by dealers to the prices specified, the resulting economic restraint is functionally indistinguishable from the anticompetitive situation which arises from a purely horizontal price fixing conspiracy among retailers.<sup>30</sup>

... [T]he record plainly reveals that Wanamaker and Strawbridge [competitors of plaintiff] complied with the prices established with knowledge that the American scheme required concerted retailer adherence for its effectiveness, thereby rendering these two retailers parties to the resultant unlawful conspiracy under the principles of *Masonite* and *Interstate Circuit*.<sup>31</sup>

The court recognized that *Colgate*, as interpreted by *Parke, Davis*, permitted the mere announcement in advance of the company's policy, followed by a simple refusal to deal. It went on to render this limited right meaningless by stating that if dealers are aware of the supplier's overall marketing policy and if they conform to that policy in order to make it effective, a conspiracy is formed. This the court of appeals did not buy.

The case of *Lessig v. Tidewater Oil Co.*<sup>32</sup> involved both price maintenance and tying. Plaintiff contended that his service station lease was terminated because he refused to cooperate with defendant in either program. The court of appeals found that the facts showed the existence of a price fixing conspiracy between Tidewater and its dealers. But more important is what the court had to say about an instruction given by the trial court concerning the tying arrangement:

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<sup>30</sup> 206 F. Supp. at 937-8.

<sup>31</sup> *Id.* at 942.

<sup>32</sup> 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).



The jury was instructed that Tidewater could "urge and encourage" its dealers to buy "all their TBA" from Tidewater, and "express disappointment" if it found they were buying from others. We think the instruction went too far. If the evidence established that Tidewater followed the course of conduct described and that Tidewater's dealers thereafter purchased from it their requirements of sponsored TBA items, an inference of tacit agreement would be virtually compelled.<sup>33</sup>

Thus the court held that although a supplier might be able to announce his policy in advance and cut-off those who breach it, he cannot express disapproval if the dealers do not comply. Note that the trial court did not say that the supplier could threaten to cut-off a non-complying dealer, it merely instructed the jury that the supplier could "express disappointment." This instruction "went too far."

In 1964 *Simpson v. Union Oil Co*<sup>34</sup> was decided by the Supreme Court. Gas was sold by Union to Simpson under a consignment contract which required Simpson to observe the prices fixed by Union. Simpson cut prices so his lease was not renewed. The court found that an agreement, even though coerced, existed between Simpson and Union and thus the subsequent refusal to deal was unlawful:

We made clear in [*Parke, Davis*] that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is.<sup>35</sup>

The case is a further encroachment upon *Colgate* because it held (1) an agreement between the supplier and his customer alone is sufficient upon which to base a violation of Section 1, (2) the customer is not barred by the defense of *in pari delicto* in asserting his cause<sup>36</sup> and (3) the "agreement" need not be an agreement at all, rather it may be coerced "compliance." The dealer did not even impliedly agree to sell at the supplier's prices, he was forced to do so.

*Broussard v. Socony Mobile Oil Co.*<sup>37</sup> and *Quinn v. Mobil Oil Co.*,<sup>38</sup> both decided in the court of appeals, cast more doubt upon the *Parke, Davis* dictum that a supplier may announce his policy to refuse to deal with price-cutters. In *Broussard* the court upheld plaintiff's cause of action for defendant's refusal to deal (cancelled lease) when plaintiff alleged that he was threatened with termination if he did not raise his prices. He complied for awhile after the threat and then reduced the price again, at

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<sup>33</sup> *Id.* at 473.

<sup>34</sup> 377 U.S. 13 (1964).

<sup>35</sup> *Id.* at 17.

<sup>36</sup> The term "*in pari delicto*" is used rather loosely and in its broadest sense at this point for simplicity. For a more accurate analysis of this and related doctrines, see, Note, 30 OHIO ST. L. J. 332 (1969).

<sup>37</sup> 350 F.2d 346 (5th Cir. 1965).

<sup>38</sup> 375 F.2d 273 (1st Cir.), *cert. denied*, 389 U.S. 801 (1967).

which time he was cut-off. The court found that his short-lived compliance created the necessary agreement.

In *Quinn* the facts were the same except that plaintiff never complied with defendant's demands, nor did he allege that any other dealer did so. The court dismissed. It is interesting to note, however, what the court believed would have been sufficient to establish a cause of action:

In *Broussard* there was clear evidence that the supplier's insistence that the retail price be reduced was part of a "marketing program" . . . .

The allegation that defendant terminated the lease, despite the fact that plaintiff's business had increased substantially, perhaps comes close to raising an inference that defendant was policing a general scheme to fix prices for the area. But this court should not be required to so speculate. Nor is it too much to require this plaintiff, absent the showing of an agreement, to allege . . . that the acts took place within the larger framework of a pricing program, policy or conspiracy . . . .<sup>39</sup> [Emphasis Added]

The court apparently is stating that if plaintiff's lease were cancelled in order to help enforce a general program of price fixing, a cause of action would lie against the supplier.

The Supreme Court in *United States v. General Motors Corp.*<sup>40</sup> caused further concern for *Colgate* worshippers when it stated:

On the contrary, overriding corporate policy with respect to proper dealer relations dissuaded General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided in *Parke Davis*. . . .<sup>41</sup> [Emphasis Added].

At the outset of this article, the writer indicated that the *Colgate* doctrine received a severe blow in 1968 from two Supreme Court decisions — *Albrecht* and *Texaco*.<sup>42</sup> The Round Three cases which have already been considered plus *Albrecht* and *Texaco* clearly indicate that new law is in the making. A supplier who has sufficient economic power to enforce his price policy as to some of his dealers will no longer be able to announce in advance his policy to refuse to deal with price cutters. If he does, some of his dealers will be coerced into observing his price suggestions. This will create the necessary combination, and any subsequent refusal to deal for the purpose of enforcing the price policy will be unlawful. One might go further and conclude that the mere termination of dealers who do not observe "prevailing market prices," without an advance announcement of such a policy, will be a violation. If enough price-deviants are terminated, at some point in time a marketing policy

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<sup>39</sup> *Id.* at 276.

<sup>40</sup> 384 U.S. 127 (1966).

<sup>41</sup> *Id.* at 143-4.

<sup>42</sup> See, notes 2 and 3 *supra*, and accompanying text.

will become clear to the other dealers. They will become aware that the supplier is cutting-off anyone who deviates from his suggested price or from the prevailing market price. If the supplier has sufficient economic power, some of these dealers will be *coerced* into observing the correct price. If this occurs, a *combination* is formed, and any *subsequent* refusal to deal to enforce the price policy will be unlawful. *Colgate* will only have validity in those cases where (1) the refusal to deal was not for the purpose of enforcing some anticompetitive policy or (2) the supplier does not have sufficient power over the dealers to enforce his anticompetitive policy. In other words, *Colgate* will be limited to those cases where it is unnecessary. Now to support this thesis with further cases.

In *Albrecht* plaintiff was an independent distributor of defendant's newspapers, having purchased a home delivery route. Plaintiff was charging a higher price for the papers than defendant desired, so defendant hired a newspaper circulation company to solicit plaintiff's customers from him. The company successfully solicited 300 of plaintiff's 1200 customers and these were given by defendant to another independent distributor, with the understanding that they would be returned to plaintiff if and when he conformed to the pricing policy. The court found a conspiracy to fix prices between the circulation company, the independent distributor and defendant. But the language of the Court is important. In characterizing *Parke, Davis* it said:

The combination with retailers [in *Parke, Davis*] arose because their acquiescence in the suggested prices was secured by threats of termination . . . .<sup>43</sup>

The fact is, *Parke, Davis* found that a combination was entered into by the retailers and *Parke, Davis* because each was solicited and informed that his competitors had agreed to maintain prices. The *Parke, Davis* Court expressly stated that *Colgate* permitted a seller to threaten cancellation. The fatal error by *Parke, Davis* was that it obtained assurances of compliance from each retailer and then communicated these assurances to every other dealer. The dealers did not comply solely in order to avoid termination, but rather because their competitors had agreed to comply.

It must be assumed that the *Albrecht* Court's construction of *Parke, Davis* was not accidental. The Court is stating that *coercion* by threat of termination is sufficient to create a *combination* if the dealers acquiesce. Further, the Court stated that under the *Parke, Davis* rule:

petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might have successfully claimed that respondent had *combined with other carriers because the firmly enforced*

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<sup>43</sup> 390 U.S. at 149.

*price policy applied to all carriers, most of whom acquiesced in it.*<sup>44</sup>  
[Emphasis Added].

From this it can be reasoned that the only price maintenance policy that is legal is one which is not or cannot be enforced. For if the policy is enforced, say by refusals to deal, some dealers will soon be coerced into acquiescence. A subsequent refusal to deal will be a result of the unlawful combination to maintain prices.

Note should be made of how far the Court has traversed since *Colgate*. In *Colgate* the Court assumed that no combination could be found without first proving that some *agreement* had been entered. Today a combination can be established by proving that the supplier and his dealer openly *disagreed*, such as when the dealer must be coerced into obeying the pricing policy.

The *Texaco* case involved a sales commission plan between Texaco and Goodrich covering TBA products. The plan involved the sale of TBA to Texaco dealers by Goodrich, with Texaco receiving a commission on all sales made to its dealers. Texaco frequently reminded its dealers that it desired them to buy Goodrich TBA, but no overt coercion was exercised. The Court found a violation of Section 5 of the Federal Trade Commission Act. The dealers were coerced into accepting the Goodrich TBA by the immense power that Texaco held over them, notwithstanding the lack of overt threats:

A service station dealer whose very livelihood depends upon the continuing good favor of a major oil company is constantly aware of the oil company's desire that he stock and sell the recommended brand of TBA . . . With the dealer's supply of gasoline, his lease on his station, and the Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is "perfectly free" to reject Texaco's chosen brand of TBA.<sup>45</sup>

Although *Texaco* involved a charge under Section 5 of the FTC Act and therefore no contract, combination or conspiracy had to be shown, the Court's reasoning applies equally well to the refusal to deal situation under Section 1 of Sherman. The mere announcement of suggested prices by Texaco will coerce some dealers into compliance and thus an unlawful combination will be formed. If Texaco later were to cut-off a dealer who did not follow the prices, the refusal to deal would violate Section 1 of Sherman. Even if Texaco did not announce suggested prices, but rather it merely began to cut-off dealers who deviated from the prevailing market price, a combination could be found at some point in time — when the other dealers recognized the marketing policy behind all of

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<sup>44</sup> *Id.* at 150, note 6.

<sup>45</sup> 393 U.S. at 229.

the terminations. Subsequent refusals to deal to enforce stable prices would be illegal.

The Texaco situation is a relatively easy case to decide under this theory. There will be many occasions when it will be difficult to determine if the requisite coercive power is present. Texaco owned the leases of over 40 percent of its dealers, the term of the lease was short (one-year), the contract to supply the dealers' products could be cancelled upon 30 days notice, and the dealers were small businessmen with a large percentage of their meager capital tied up in the station, while Texaco was a giant. All of these factors and others created enormous coercive power in Texaco. If the product is patented or trade-marked and if there are no close substitutes, the supplier's power is enhanced. The diversity of the buyer is important — *i.e.*, does the supplier's product(s) constitute a large percentage of the buyer's sales? Are the prices uniform among the dealers? If so, this is evidence of coercive power.

It should be noted that the question of whether the seller has coercive power does not require power over each and every dealer. It is sufficient to show a combination if the plaintiff can prove that the seller has coercive power over *one* dealer if that dealer is actually coerced into the combination. However only unreasonable restraints of trade are condemned by the Sherman Act, so a plaintiff will probably have to show that many dealers were actually coerced in order to establish a violation of Section 1.

One more problem must be resolved. If the service station dealers are coerced by Texaco into observing uniform prices and if plaintiff's lease is terminated because of his refusal to conform, does the plaintiff have a cause of action against the dealers who formed part of the combination? To be logically consistent it would seem that the answer should be "yes", although as a matter of policy this would be a harsh result. If it had not been for the acquiescence by the other dealers, plaintiff's lease would not have been terminated — Texaco would have been forced to back down. On the other hand, these dealers were unwilling conspirators who had no effective alternative.

The answer to this dilemma lies in *Perma Life Mufflers, Inc. v. International Parts Corp.*<sup>46</sup> That case holds that when a dealer is coerced into an unlawful contract by his supplier, he has a cause of action against the supplier to recover any losses that he suffered under the contract. If, then, a dealer who is cut-off by Texaco should decide to bring suit against his fellow dealers, the defendant dealers will be able to shift this entire loss back to the supplier, Texaco.

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<sup>46</sup> 392 U.S. 134 (1968). This case is considered in Note, 30 OHIO ST. L. J. 322 (Spring 1969).

## V. CONCLUSION

Almost from the moment of its birth, *Colgate* has been engaged in a fierce struggle for survival. Today it appears that the battle is nearly completed. Such opponents as *Schrader's*, *Beech-Nut*, *Bausch* and *Parke, Davis* have weakened the doctrine, and some as yet unknown opponent, following theories of *Texaco* and *Albrecht*, will finish it. A manufacturer or supplier who has the economic power to enforce an anticompetitive policy will no longer be able to unilaterally refuse to deal for that purpose. If the policy would be illegal if the supplier had overtly conspired with others to enforce it, then he will not be permitted to use the refusal to deal to enforce the policy.

In order to find a violation using the theory outlined in this article, a court would have to decide (1) that there was a unilateral refusal to deal, (2) that the refusal was to enforce an illegal policy, (3) that the supplier had sufficient economic power to coerce at least one of his dealers into acquiescence and acceptance of the policy, (4) that some dealer was in fact coerced immediately before the refusal occurred, and (5) that an unreasonable restraint of trade has occurred.

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